MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian Hartman

Re: Recent Legislative & Regulatory Initiatives

Date: May 8, 2007

I am providing my comments on thirteen (13) legislative and regulatory initiatives in anticipation of the May 10 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DMMA Final Home Equity Medicaid Disqualification Reg. [10 DE Reg. 1700 (May 1, 2007)]

This is an information item.

The SCPD and GACEC commented on the proposed version of these regulations in March, 2007.

The DRA disallows Medicaid LTC eligibility if an applicant has either: 1) $500,000 in home equity or 2) at a state's option, some amount between $500,000 and $750,000. The Councils noted that some states (Maine; New York) had adopted the $750,000 cap and recommended that Delaware do likewise. The Councils observed that the President's proposed budget would remove the state option and that it was possible that states adopting the higher cap would be "grandfathered".

The Division declined to adopt a higher cap based on the notion that Medicaid is a program for low-income individuals and that the $500,000 cap is generous. Since the regulations are final, I recommend no further action.

2. DSS Final "Work for Your Welfare" Regulations [10 DE Reg. 1704 (May 1, 2007)]

This is an information item.

The SCPD and GACEC submitted four (4) comments on the proposed version of these regulations in March, 2007. The Division has now adopted final regulations with some amendments.

First, the Councils noted that the formulas in Section 9092 were ostensibly inconsistent and recommended clarification. Although I continue to believe they are confusing, DSS responded that they are consistent and effected no change.

Second, the Councils noted an incorrect representation that the new standards lowered the age of an infant exempting the parent from work. DSS agreed and substituted "increases" for "lowers".

Third, the Councils recommended that Section 9092, Par. 2, be amended to clarify whether DSS envisioned use of the federal or state minimum wage in its calculation of required hours of participation. DSS agreed and inserted "state" prior to "minimum wage".

Fourth, the Councils recommended deletion of an extraneous "or" in Section 9082. DSS agreed, attributed the error to the publisher, and earmarked the "or" for deletion in the final regulations.

Since the regulations are final, and DSS effected 3 of 4 amendments suggested by the Councils, I recommend no further action.

3. DSS Final Child Care Subsidy Regulations [10 DE Reg. 1703 (May 1, 2007)]

This is an information item.

The SCPD briefly reviewed the proposed version of these regulations in March, 2007. Since the changes were minor and technical, the Council did not submit comments. DSS did not receive any public comments and has now adopted final regulations without amendment.

4. DSS Final Food Stamp Employment & Training Program Reg. [10 DE Reg. 1708 (May 1, 2007)]

The SCPD and GACEC commented on the proposed version of these regulations in March, 2007. Given the potential effect of the standards on DVR, the comments were also shared with the DVR Director. DSS has now adopted final regulations incorporating 1 recommendation.

First, the Councils objected to adoption of a categorical provision excluding "services to obtain employment". The Councils noted that the federal regulations explicitly authorize services to obtain employment. DSS, citing other regulations, suggests that services to "start" a job are not covered. DSS effects no amendment. I continue to interpret the exclusion as "overbroad".

Second, for similar reasons, the Councils objected to deletion of an authorization to fund clothes for a job interview. DSS anomalously agreed and reinstated a provision authorizing a $150 clothing allowance for "clothes that are appropriate for interviewing".

Third, the Councils objected to deletion of pre-employment dental services and suggested some alternative provisions. DSS declined to adopt any of the alternatives based on its belief that the federal program does not extend benefits to persons "starting or obtaining employment".

Since the regulations are final, I recommend no further action.

5. Dept. Of Insurance Final Young Adult Insurance Regulations [10 DE Reg. 1711 (May 1, 2007)]

The SCPD and GACEC endorsed the proposed version of these regulations in March, 2007. The standards implement legislation requiring insurers to offer dependent coverage for young adults up to their 24th birthday under certain circumstances.

The Department has now adopted final regulations with two amendments. The insurance industry noted that the State employee benefit plan had not adopted the extended benefits option for certain forms of insurance, including life, long-term care, vision, and dental. Therefore, the industry objected to the regulations insofar as they covered such forms of insurance. The Insurance Department incorporated an amendment making the regulations applicable to the extent adopted and implemented in the State Employees Benefit Plan. The effective date of the standards was also changed to June 1, 2007.

Since the regulations are final, I recommend no further action.

6. DMMA Prop. Medicaid Fraud Education Regulations [10 DE Reg. 1660 (May 1, 2007)]

The Division of Medicaid & Medical Assistance proposes to adopt regulations implementing Section 6032 of the Deficit Reduction Act of 2005 ("DRA"). Section 6032 contemplates active enforcement of Medicaid fraud. It requires entities receiving or making annual payments under a Medicaid State Plan of at least $5 million annually to establish and disseminate written policies about Federal and State false claims. CMS clarified expectations through the attached December 13 letter. CMS also provided the attached State Plan Amendment template for guidance. Covered agencies would include MCOs and large providers such as hospitals. DMMA will require each covered entity to submit policies and dissemination plan within 3 months of approval of the State plan amendments. At 1664. I attach a model policy published by the Wisconsin Hospital
Association

DMMA has essentially followed the CMS template for its proposed State Plan amendment. However, the "background" section of the regulations recites that covered entities must also include in policies State law provisions, both civil and criminal, dealing with whistleblowers, fraud, waste, and abuse. At 1661. This requirement is only obliquely addressed in the text of the regulation. At 1664. Relevant state law provisions could include the following: 1) insurance and health care fraud (Title 11 Del.C. §§913 and 913A); official misconduct (Title 11 Del.C. §1211); insurance fraud (Title 18 Del.C. Ch. 24); and public assistance fraud (Title 31 Del.C. Ch. 10). DMMA could consider including some specific references to such State law provisions in its regulations.

I recommend endorsement of the regulations subject to elaboration on the requirement of inclusion of State law fraud references.

7. Department of Insurance Proposed Discrimination Regulation [10 DE Reg. 1670 (May 1, 2007)]

Title 18 Del.C. §2304(13) prohibits unfair discrimination in life insurance, annuities, and health insurance as follows:

> a. No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.
>
> b. No person shall make or permit any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

The Insurance Commissioner proposes to implement this statutory prohibition through the following regulatory provision:

> The following are hereby identified as acts or practices in life and health insurance which constitute unfair discrimination between individuals of the same class: Refusing to insure, or refusing to continue to insure, or limiting the amount, extent or kind of coverage available to an individual, or charging a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation or rate differential is based on, or is related to actual or reasonably anticipated experience.

I have the following observations.

First, as the title to the regulation indicates, it covers life insurance, annuities and health insurance. However, the proposed Section 1217 is administratively placed within 18 DE Admin Code Ch 1200 which only covers life insurance and annuities. Health insurance is covered by 18 DE Admin Code Chapters 1300 and 1400. The Commissioner may wish to consider adopting two separate regulations, i.e., one covering life insurance and annuities in Chapter 1200 and a second covering health insurance in Chapter 1300 or 1400.

Second, the proposed regulation literally authorizes a refusal to issue a life or health insurance policy to a person with a physical disability if based on actual or reasonably anticipated experience. This provision may violate Title 18 Del.C. §2316 which prohibits refusal to issue a life or health insurance policy based on blindness or deafness regardless of whether refusal is based on actual or anticipated experience. For example, even if an insurer had actuarial data demonstrating that persons who are blind or deaf have a shorter life expectancy than the general population, Title

18 Del.C. §2316 would preclude consideration of that data in justifying refusal to issue a life insurance policy. Alternatively, if an insurer had actuarial data showing that persons who are deaf/blind have high medical costs, §2316 would preclude consideration of that data in justifying refusal to issue a health insurance policy.

Third, there is some "tension" between authorizing consideration of data on actual or reasonably anticipated experience and the statutory prohibition on consideration of genetic characteristics and information. See Title 18 Del.C. §2317; Title 19 Del.C. §§710(8) and 711(a)(1); and Executive Order No. 81 (May 2, 2006). For example, an individual could have an asymptomatic condition which, based on genetic correlates, has a high probability of developing into a debilitating illness. If the currently asymptomatic condition is deemed an "impairment", the regulation would allow discrimination if "related to actual or reasonably anticipated experience." However, this would violate the above statutes which prohibit consideration of genetic information.

Fourth, the term "or related to" ...experience is rather broad. It would be preferable to simply recite that the refusal, limitation, or rate differential is based on actual or reasonably anticipated experience.

Based on the above observations, I recommend the following:

1. Amend proposed Section 3.1 by deleting ",or is related to" in the last line.

2. Add a Section 3.2 to read as follows:

> 3.2 Prohibited acts or practices identified in this section supplement, and do not supplant, the statutory prohibition on refusal to issue policies to persons who are blind or deaf (Title 18 Del.C. §2316) and the statutory prohibition on use of genetic characteristics and information (Title 18 Del.C. §2317).

I recommend sharing the above observations and recommendations with the Department of Insurance.

8. H.B. No. 123 (Dental Care for Pregnant Medicaid Recipients)

This bill was introduced on April 5, 2007. It was reported out of the Health & Human Development Committee on April 25. There is a fiscal note. The bill remained in the House Appropriations Committee as of May 7, 2007.

The legislation authorizes both urgent and preventative dental care for Medicaid beneficiaries who are pregnant or who become pregnant while receiving assistance. The Committee report notes that inadequate oral health in linked to premature births. I attach corroborative materials which provide the following information.

First, research suggests that periodontal disease may be a significant risk factor for pre-term, low-birthweight babies.

Second, pregnancy causes hormonal changes which increase the risk of developing gum disease. This is commonly referred to as "pregnancy gingivitis".

Third, pregnant women are at risk of developing "pregnancy tumors" which arise from swollen gums.

Given the benefits to pregnant women and developing fetuses, I recommend endorsement. The only technical oversight in the bill is minor, i.e., the parentheses before and after the numeral "12" in line 3 are omitted.

9. H.B. No. 129 (Family Support Coordinating Council)

This bill was introduced on April 17, 2007. It was reported out of committee on May 2. There is no fiscal note.

The legislation establishes a Family Support Coordinating Council with a rather broad mandate, i.e., to "provide leadership in assuring that high-quality, research-based, outcome-measured family education, support and early care and education programs are available statewide" (lines 5-7). The Council Chair would be chosen by the Legislature's "Kid's Caucus" (line 21). There are twelve members, three of whom are from State agencies (DPH; DOE; and DSCY&F) (lines 11-21). An annual report would be submitted to the Governor and Legislature (lines 27-28). Staff support would be provided by an agency designated by the Governor as the lead agency to administer the State grant under the federal Community-based Grants for the Prevention of Child Abuse & Neglect (CBCAP) program (lines 22-25).

I have the following observations and recommendations.

First, apart from appointment of the Chair, the bill does not address how members are appointed. This is a significant oversight.

Second, the chair is "appointed by the members of the Kid's Caucus". The "Kid's Caucus" is a bipartisan group of legislators interested in children's issues. See attached April 8, 2007 News Journal article. However, this is ostensibly not an "official" government organization. Analogous legislation generally authorizes nominations or appointments by the Governor, Speaker of the House, or President Pro Tempore of the Senate. Since this is designated as a "permanent" council (line 3), it may be preferable to authorize appointment by some "official" or "official body".

Third, I recommend revising line 9 to read as follows: "The Family Support Council shall represent the cultural, economic, health, and geographical diversity ...". The term "cultural" is broader than "racial". The term "health" would "capture" children with special health needs.

Fourth, in line 12, the word "whom" should be substituted for "which" since this is a personal pronoun relating back to "children".

Fifth, in line 11, parental composition could be improved by adopting the following substitute:

> Two (2) parents of school age children, one of whom is the parent of a student with a disability nominated by the Governor's Advisory Council for Exceptional Citizens.

Sixth, the focus of the Council is unclear. It appears to cover services from newborns (line 17) through "school age" children (line11). The bill ostensibly contemplates work on child abuse/neglect prevention (lines 22-25); early care (line 6); and education programs (line 6). It would be preferable to define the intended focus and functions of the Council with more specificity.

I recommend sharing the above observations and recommendations with policymakers.

10. H.B. No. 128 (CHIP Income Cap)

This bill was introduced on April 17, 2007 and remained in the House Health & Human Development Committee on May 7.

The federal Children's Health Insurance Program (CHIP) is designed to provide health insurance to uninsured children of families who do not qualify for traditional Medicaid. Delaware's version of CHIP is known as the "Delaware Healthy Children Program".

This bill has two (2) effects. First, it raises the family income cap to 300% of the Federal Poverty Level (lines 59-63). Second, it authorizes families to pay any premiums by "any commercially accepted means, including by cash, check, or charge" (lines 64-66).

The bill provides an extensive list of findings justifying this initiative. They include the following: 1) increase in percent of uninsured children in Delaware from 7.5% (2000-2002) to 10.7% (2004-2006 (lines 12-13); 2) large number (20,000) of children in State without health insurance(line 9); and 3) deleterious effects of lack of health insurance on school attendance and performance (lines 46-50). I attach May 18, 2006, December 6, 2006, and April 30, 2007 News Journal articles corroborating the large number of uninsured Delawareans. I also attach an August, 2006 Issue Brief which describes the importance of CHIP to children with special health care needs.

I recommend a strong endorsement of this legislation.

11. S.B. No. 78 (PKU Insurance Coverage)

This bill was introduced on April 24, 2007. It was reported out of committee on May 2 and awaited action by the Senate as of May 7. There is a fiscal note.

I am attaching several sets of background materials. Phenylketonuria (PKU) is a hereditary disease caused by lack of a liver enzyme required to digest phenylalanine, an amino acid in many protein-containing foods. The gene defect is a recessive gene trait. Ninety percent of affected persons have blond hair and blue eyes. Incidence is approximately 1 in 17,000 live births. PKU-affected children who are not placed on a special diet suffer irreversible brain damage and mental retardation. According to the attached table authored by the National PKU News, approximately thirty (30) states require private insurers to cover PKU-related foods/formula. Of the thirty (30) states, most also require coverage of food/formula for other inherited metabolic diseases as well. Delaware's neighboring states adopted legislation requiring such insurance coverage more than a decade ago [Maryland (1995); Pennsylvania (1996); and New Jersey (1997).

S.B. No. 78 is based on the Maryland law which is touted as a model by the PKU News. It is included in the Insurance Commissioner's attached Legislative Agenda released on March 19, 2007.

I recommend endorsement of this important disability prevention bill with one caveat, i.e., the sponsors may wish to consider whether the bill should be strengthened. The bill literally requires insurers to "cover" food and formula. In theory, an insurer could create a separate category of "coverage" of metabolic disease-related food/formula with high co-pays or deductibles. The insurer could essentially pay "lip service" to the law by providing very limited "coverage" through a meager subsidy of costs. Contrast the mental health parity statute [Title 18 Del.C. §3577(b)] which is prescriptive in addressing insurer coverage standards. The sponsors may wish to consider options in this context.

A copy of the Council's comments should be shared with the Insurance Commissioner.

12. S.B. No. 37 (Health Insurance Rate Regulation)

This is an important bill. It was introduced on March 28, 2007. It was reported out of committee on March 28. As of May 7, 2007, it awaited further action in the Senate.

As background, Delaware law currently authorizes the Insurance Commissioner to review rates charged for auto insurance, homeowner's insurance, and all other forms of property and casualty insurance. However, rates charged by large health insurers are exempt from Insurance Commissioner review. See Title 18 Del.C. §2506(e).

This bill would remove the health insurer exemption from Commissioner review. Health insurers would be required to file rating plans (§2504) which would be subject to review based on several standards, including whether the rates are excessive or discriminatory [§2503(2)].

I recommend endorsement. Health insurance affects thousands of Delawareans and double-digit rate hikes are not uncommon. It is anomalous to authorize the Insurance Commissioner to regulate rates of other common forms of insurance while exempting health-related insurance.

13. S.B. No. 88 (Nursing Home Administrators)

This lengthy (16-page) bill was introduced on May 1, 2007. It remained in the Senate Sunset Committee as of May 7.

As background, the SCPD and GACEC commented on a similar bill, H.B. No. 72, in May, 2005. I attach a copy of the GACEC's May 3, 2005 correspondence. The Council's comments ostensibly prompted the attached H.A. No. 1 to H.B. No. 72.

The new legislation, S.B. No. 88, is similar to H.B. No. 72 as amended. While it represents an improvement over the predecessor bill, I still have the following observations.

First, the bill requires small facilities which are not nursing homes to have a "nursing home administrator" (lines 25-30, 452-454). This may be unnecessary. For example, current DLTCRP regulations for Rest (Residential) Homes (16 Admin Code Part 3230) provide as follows:

> 1.0 Definition
>
> "Rest (Residential) Home" is an institution that provides resident beds and personal care services for persons who are normally able to manage activities of daily living. The home should provide friendly understanding to persons living there as well as appropriate care in order that residents' self-esteem, self-image, and role as a contributing member of the community may be reinforced.
>
> 7.1.1. ...Supervision by a licensed Nursing Home Administrator is not required for facilities with 4-8 beds inclusive. ...

In contrast, the bill requires a Nursing Home Administrator for each home with more than 4 persons. Colloquially speaking, this may be "overkill". The sponsors may wish to raise the threshold for requiring a Nursing Home Administrator from "more than 4 persons".

Second, proposed Section 5216 literally authorizes discipline for having a physical condition or disability:

> A practitioner licensed under this Chapter shall be subject to disciplinary actions set forth in §5218 of this Chapter, if, after hearing, the Board finds that the nursing home administrator:
>
> > ...(9) has a physical condition such that the performance of nursing home administration is or may be injurious or prejudicial to the public.

Disciplining a licensee for having a physical condition violates the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. Even if a physical condition causes some limitation on ability to perform as a nursing home administrator, this is insufficient grounds to justify discipline.

Third, the bill runs afoul of the ADA and Section 504 in the context of use of prescriptions:

> A practitioner licensed under this Chapter shall be subject to disciplinary actions set forth in §5218 of this Chapter, if, after hearing, the Board finds that the nursing home administrator:
>
> ...(4) has excessively used or abused drugs either in the past two years or currently.

This provision likewise violates the ADA and Section 504 of the Rehabilitation Act. As the GACEC noted in its May 3, 2005 letter, this provision literally means that a licensee who had lots of prescriptions (e.g. prescription skin creams) two years ago is subject to discipline. The drugs may be perfectly legal, non-narcotic, over the counter or prescribed, and still subject the licensee to discipline if subjectively deemed "excessive". Indeed, there is an age discrimination component to this provision. Consistent with the attached table, persons aged 65+ average almost 10 prescriptions per year which could be construed as "excessive" based on "average" usage among the general public

Fourth, there are a few minor grammatical errors, i.e., the word "non-administrator" should be plural in line 54 and the word "therefore" should be "thereof" in line 358.

I recommend sharing the above observations with policymakers.

Attachments

F:pub/bjh/legis/fy07p&l/507bils

E:507bils